This final decision is issued by me, Nimish Patel, an Ombudsman with the Financial Ombudsman Service.

My colleague, Ombudsman Graham Booth, issued a Provisional Decision on 13 July 2017 ("the Provisional Decision") explaining that he was not minded to uphold the complaint and setting out his reasons for reaching those provisional conclusions.

As the parties are aware, the complaint has now been passed to me to determine. I wrote to the parties on 21 August 2017 explaining that:

- Having considered the evidence and arguments presented by the parties prior to the Provisional Decision, I was minded to reach the same conclusions as Ombudsman Booth provisionally reached about what is fair and reasonable in the circumstances of Mr and Mrs G's complaint and for the same reasons.

- In the circumstances and subject to any further evidence and representations submitted by the parties since the Provisional Decision, I was minded to determine the complaint and issue a final decision in the terms set out in the Provisional Decision.

- I would consider the parties' further representations (together with the evidence and arguments submitted before the Provisional Decision) before reaching my final decision.

Both parties made further submissions, all of which I have considered carefully. This is my final decision on Mr and Mrs G's complaint.

summary

1. This dispute is about the sale in 2002 of a payment protection insurance (PPI) policy to support a Cheltenham & Gloucester Plc (C&G) mortgage.

2. Mr and Mrs G complain that C&G included the policy as part of a package with their mortgage without making it clear they had a choice about buying it. They also say C&G did not properly explain the policy's features, exclusions and limitations. If it had, they say they would not have taken the policy out.

3. C&G says Mr and Mrs G were given a choice about whether or not to take out the policy, the policy was suitable for them and if it had given Mr and Mrs G more information about the policy, it would not have affected their decision to take it out.

4. I have carefully considered all of the evidence and arguments submitted by both sides, in order to decide what is, in my opinion, fair and reasonable in all the circumstances of this complaint.

5. This is not a straightforward complaint, with both parties making credible arguments in support of their positions. But for the reasons I explain in detail below, I have decided to determine the complaint in favour of C&G, to the extent that I do not propose making an award in favour of Mr and Mrs G.

6. This is a final decision. In summary, having considered all of the evidence and arguments submitted by the parties during the course of the complaint, my final conclusions are as follows:

   - Mr and Mrs G made their decision to take out the policy based on advice and information C&G gave them about the policy.

   - Taking into account the law, industry codes of practice and what I consider to have been good practice in 2002 (there were no applicable regulations at the time), C&G should fairly and reasonably have advised Mr and Mrs G with reasonable care and skill. In particular, it should have considered whether the policy was appropriate or 'suitable' for them, given their needs and circumstances. It should also fairly and reasonably have provided Mr and Mrs G with sufficient clear, fair and not misleading information about the policy it was recommending to them, to enable Mr and Mrs G to make an informed decision about whether to follow the recommendation and take out the policy.

   - C&G did not act fairly and reasonably in its dealings with Mr and Mrs G. It did not advise Mr and Mrs G with reasonable care and skill – it did not take sufficient steps to establish whether the policy was suitable for Mr and Mrs G (although the policy it recommended was ultimately suitable for them). And it did not provide them with all the information they needed to make an informed decision about whether to take out the policy.

   - Mr and Mrs G made their decision to take out the policy based on this recommendation and incomplete information. But if things had happened as they should, on the evidence available in this case, it is more likely than not Mr and Mrs G would still have taken out the policy.

   - It would not be fair in those circumstances to make an award to compensate Mr and Mrs G for the money they spent in connection with the policy.

7. Under the rules of the Financial Ombudsman Service, I am required to ask Mr and Mrs G either to accept or reject my decision before XX December 2017.

background to the complaint

a) events leading up to the complaint

8. In April 2002, Mr and Mrs G applied for a C&G mortgage. They met with a member of C&G staff who completed a Loan Assessment Form, a mortgage application form (headed 'Choosing your mortgage') and a Payment Protection Plus Proposal Form.

9. The mortgage application form, which Mr and Mrs G signed, included a section headed 'insurance'. Mr and Mrs G ticked a box to indicate that that they wished to apply for 'Payment Protection Plus' and had completed the Proposal Form included at the back of the application pack. Mr and Mrs G also signed the Proposal Form seeking cover for Mr G only and Mr G also signed a direct debit mandate for the policy.

10. Mr and Mrs G's new mortgage was made up of three secured loans – one to repay their existing mortgage, one to repay a caravan loan, and a smaller loan to repay a car loan and credit card balance. The larger loans had an eight-year term and the smaller loan a three-year term. In total, Mr and Mrs G borrowed £35,695.

11. The loans and the policy started on 25 July 2002. Mr G paid the £17.85 monthly premium by direct debit.

12. The policy was cancelled on 24 May 2004 and the mortgage was redeemed the following month. In total, Mr and Mrs G made 22 PPI payments – £392.70.

b) Mr and Mrs G's circumstances in 2002

13. Mr and Mrs G were re-mortgaging from a different lender to get a better interest rate and to refinance other debts. Their previous mortgage was also protected by a PPI policy (and had been since 1990) that covered only Mr G. Mr G was 53 years old at the time.

14. According to the mortgage application form, Mr G earned £18,800 per year as a manager at a supermarket. He had worked for his employer since 1985. Mrs G earned £10,135 per year as an accounts clerk and had worked for her employer since 2000.

15. Separately, Mr G has told us that:

    - He would have received between three and six months' pay if he was off work due to sickness or accident and that at least three months of that would have been at full pay.

    - He would have received death in service benefit and redundancy pay.

    - He did not have any savings or other insurance policies.

    - He did not have any health problems at the time.

    - They missed a few of their mortgage payments, but have paid it off now.

16. Based on the statutory redundancy provisions at the time, it seems likely Mr G would have been entitled to statutory redundancy of between five and six months' pay.

17. I note for the sake of completeness that Mr and Mrs G indicated on the payment protection insurance questionnaires they completed during the course of the

complaint that Mr G earned £14,000 per year and Mrs G had a different employer for whom she had worked for four years in 2002.

18. I am, however, satisfied it is more likely than not that they are mistaken in their recollection of events and that the mortgage application form provides a more accurate, contemporaneous, record of their income and employment details.

19. Mrs G has also told us that:

- She would have received between three and six months' pay if she was off work due to sickness or accident and that at least three months of that would have been at full pay.

- She did not have any savings or other insurance policies.

c) the policy – what was C&G selling and what did Mr and Mrs G buy?

20. C&G has provided a copy of the 'C&G Payment Protection Plus Statement of Cover' which sets out the full policy terms and conditions which applied to policies like Mr and Mrs G's sold in April 2002.

21. The policy conditions were set out in an 11-page booklet. Among other things, these show that:

- There were eligibility criteria, which Mr G met – for example he had to be 18 or over, but less than 65 and working at the start date. The cover would end when he reached 65.

- The policy provided disability cover. Broadly, if Mr G was unable to carry out the duties of his work (or 'any similar gainful occupation' which in the insurer's view he might reasonably become qualified for in view of his training, education and ability) due to injury, sickness or disease, it would pay, direct to Mr and Mrs G's mortgage, their normal mortgage payment each month. The policy would also pay an additional cash payment to Mr G of £3 per month for every £1,000 of the opening mortgage balance. The monthly benefit would continue until the disability came to an end or 12 payments had been made, whichever came first.

- The policy would provide unemployment benefits. Broadly, the policy would pay the normal mortgage payment each month, plus an additional cash benefit of £3 per month for every £1,000 of the opening mortgage balance. The monthly benefit would continue until Mr G ceased to be unemployed or he had received 12 payments, whichever came first.

- The policy would have paid out after 60 consecutive days of disability or unemployment.

- The insurer was Lloyds TSB General Insurance Limited.

22. Part of Mr and Mrs G's complaint is that Mr G would not have been able to claim on the policy as he would become ineligible at the age of 65. Given Mr G was 53

at the time and the longest loans had an eight-year term, I am satisfied that this criteria would not have affected Mr and Mrs G and their concerns are unfounded.

23. To put the benefits into context, if Mr G had made a successful claim for 12 months he would have received £7,852.32 – made up of £549.36 per month paid directly to the mortgage account (totalling £6,592.32) and an additional cash benefit of £105 per month (totalling £1,260).

24. Returning to the policy terms and conditions, there were also exclusions – for example, claims resulting from pre-existing medical conditions which Mr G knew, or should have known about, were not covered for the first 24 months of the policy being in place.

25. Part of Mr and Mrs G's complaint (as I explain below) is that the policy was poor value because it excluded or limited claims arising from back injury and mental health issues. Whilst the policy required Mr G to provide satisfactory proof of disability to make a claim, including providing a certificate from his doctor, it did not exclude back or mental health conditions, or place any additional restrictions or more onerous evidential requirements on claims relating to back and mental health issues than would have applied to any other disability.

26. It is also of note that the 'Important Notes' section contains information about C&G's status when selling the policy:

> *C&G Payment Protection Plus has been negotiated by Cheltenham & Gloucester plc and is underwritten by Lloyds TSB General Insurance Limited. Both companies are members of the General Insurance Standards Council (GISC).*

d) the complaint and C&G's response

27. Mr and Mrs G's representative We Fight Any Claim Ltd (WFAC) made lengthy and substantial representations on their behalf, prior to the Provisional Decision.

28. I will not restate them all here and I will refer to some of the specific representations they have made at relevant times in this decision. But I have read and considered them all carefully. In essence, Mr and Mrs G say:

- C&G included the policy as a package with their mortgage.
- C&G did not give them the information it should have given them about the costs and benefits associated with the policy.
- C&G did not tell them about the poor value of the policy, which is illustrated by the low claims ratio – for example the Competition Commission reported that the average claims ratio for mortgage payment protection insurance was 28%, meaning that around 28p in every pound was used to pay claims, the rest paid for costs, profits and commission. Lloyds' (of which C&G is a part) claims ratio is below 10%. C&G's failure to explain this to them was a breach of the common law duty of utmost good faith and of the FCA's principles, which require firms to treat customers fairly.

- C&G did not tell them about the limitations affecting the policy, in particular: that the policy would only pay out if Mr G was unable to do both his own job and other work which the insurer thought he was reasonably qualified to do; and that claims arising from back injury and mental health were subject to restrictions and evidential requirements which significantly reduced the cover provided by the policy and the prospects of making a successful claim. This reduced further the policy's value, particularly as those conditions are the cause of the most common reasons for long term absence.

- The common law duty of utmost good faith meant C&G should have done more than simply draw the limitations to their attention, it should also have explained the significance of them and the impact they would have on Mr G's chances of making a claim.

- The policy was not suitable because it only protected payments for the short- term, whereas a mortgage is generally someone's biggest ever long-term transaction. Evidence from the National Institute of Clinical Evidence (NICE) in 2009 confirmed that four out of five people who are off work for six months actually end up being off work for five years. Most people could cope with a relatively short-term absence such as the absence this policy protected – using a combination of residual earnings, savings, family support and a helpful approach from the lender. But cover under the policy would cease at just the time it would be most needed.

- These policies were promoted as providing peace of mind, but the number of exclusions, limitations and restrictions on the scope of the cover meant that this was untrue. The adviser knew how the insurance worked and they trusted the adviser and were entitled to rely on what was said.

- There were substantial flaws in the sale process. Had they known the true cost of the policy, the limits on the cover and its poor value, they would not have taken it out – that would have been the logical outcome, given the seriousness of the failings.

- In any event, the FCA's guidance at DISP App 3.6.2E makes it clear that it should be presumed they would not have taken out the policy unless there is evidence to outweigh the presumption. I am required to take that regulatory guidance into account when deciding what is fair and reasonable and should not depart from it, other than in exceptional circumstances when there is sufficiently good reason to take a different approach.

- C&G should pay compensation to put them in the position they would have been in if they had not taken out the policy.

29. Prior to the Provisional Decision, C&G said:

- The sale took place in branch so it is likely that it would have provided Mr and Mrs G with advice about the policy based on the information they provided when they applied for the mortgage.

- Mr G was eligible for the policy and the paperwork suggests that Mr and Mrs G were given a choice about whether or not to apply for it.

- The policy was suitable for them. Mr and Mrs G had a need for the insurance to protect their payments should Mr G not have been able to work, they were not affected by the significant exclusions and limitations and the policy was affordable.

- It is more likely than not that the adviser explained the policy features and limitations to Mr and Mrs G and gave them appropriate documentation before the sale concluded.

- Mr and Mrs G's decision to take out the policy would not have changed if it had done more.

- It was not required to disclose the commission it received.

e) the parties' representations in response to the Provisional Decision

30. Both parties made further representations in response to the Provisional Decision, all of which I have read and considered carefully. The parties, in large part, restated the substance of their prior representations.

31. I will refer to some of the specific representations made at relevant times in this decision, but, briefly and in summary, Mr and Mrs G say:

- The Provisional Decision fails to properly deal with matters raised in earlier correspondence.

- C&G did not draw their attention to the fact that the policy included extremely onerous limitations. In particular, it did not tell them about the 60-day qualification period, the 12-month limit on claims and the 'any similar gainful occupation' limitation.

- The costs of the policy were never made clear.

- The Provisional Decision ignores the fact that it was very unlikely Mr G could make a successful claim and does not properly take into account the poor value of the policy shown by the claims ratio.

- The Provisional Decision concludes that the sale was made on an 'advised' basis, and that the sale was flawed, but that the policy was suitable anyway without considering how proper advice ought to have been given and what the process should have entailed. The policy was unsuitable for them given their requirements and the limitations on cover.

- The Provisional Decision fails to properly take into account the fact that the Policy Proposal Form misrepresented the protection afforded by the policy. The Provisional Decision fails to properly take into account how a court would view those misrepresentations and the approach it would take when determining the remedy.

- C&G was under a duty to treat its customers fairly, to provide them with full and fair information and not to take advantage of their inexperience. C&G breached those duties through its misrepresentations and failure to disclose the policy's exclusions, limitations, costs, poor value and commission.

- The Provisional Decision does not properly take into account the FCA's guidance at DISP App 3.6.2, misconstrues the tests the guidance sets out and fails to properly assess and weigh up the evidence in the complaint.

- Even if it were appropriate to approach DISP App 3.6.2 in the way suggested in the Provisional Decision, no reasonably prudent consumer *'who had uncovered the truth about PPI'* would have taken it out.

32. Briefly and in summary C&G says:

- It agrees with the overall conclusions drawn in the Provisional Decision.

- It agrees that the GISC, ABI and CML publications referred to in the Provisional Decision are relevant considerations in this case, but they are not determinative of its liabilities. A court might take them into account when determining whether there has been a common law breach of a duty of care, but the GISC, ABI and CML publications do not have the status of binding obligations owed to Mr and Mrs G as if they were FCA rules.

- The overarching questions set out in the Provisional Decision appear to include wording and expectations derived from irrelevant considerations such as the FCA's Principles. It would be helpful if I could clarify which of the standards I rely on for my final conclusions and the source.

- The Provisional Decision set out what in the Ombudsman's view C&G should and should not have done. It would be helpful I were to explain what I think the legal consequences are and whether those breaches amounted to an actionable legal breach making C&G legally liable.

- Its view is that there were no actionable legal breaches. As there were no actionable breaches it would be difficult for me to reach a different conclusion to the conclusion a court might reach on the basis that it is fair and reasonable to do so – the sorts of considerations that are relevant to whether or not there has been an actionable breach of a legal duty of care will normally lead to a fair and reasonable result.

34. Mr and Mrs G have explained why they do not accept C&G's further representations. Whilst I do not consider it necessary to set out or repeat why that is the case, given the summary of the parties' representations I have already included above, I have considered all of the parties' representations carefully.

my findings

35. I have included only a summary of the complaint, but I have read and considered all the evidence and arguments available to me from the outset, in order to decide what is, in my opinion, fair and reasonable in all the circumstances of the case.

a) relevant considerations

36. When considering what is fair and reasonable, I am required to take into account relevant law and regulations; relevant regulator's rules, guidance and standards; relevant codes of practice; and where appropriate, what I consider to have been good industry practice at the time.

37. This sale took place in 2002 before the sale of general insurance products like this became regulated by the Financial Services Authority in January 2005 and before mortgage lending became regulated in October 2004. So the FSA's and FCA's overarching Principles for Businesses and insurance conduct rules (ICOB and ICOBS) are not applicable to this complaint.

38. The three loan agreements which made up the mortgage concluded in 2004. That means the unfair relationship provisions set out at s140A of the Consumer Credit Act, the Supreme Court judgment in *Plevin*[1] about s140A of that Act and the rules and guidance made by the FCA recently about the handling of complaints about the non- disclosure of commission in the light of the *Plevin* judgment, are not applicable either.

39. But there were a number of industry codes in existence at the time, which I am satisfied are applicable to my consideration of what is fair and reasonable in the circumstances of this complaint. In particular:

The General Insurance Standards Council's General Insurance Code for private customers – 'the GISC Code'

40. Mr and Mrs G's policy was sold during the period of 'self-regulation' by the General Insurance Standards Council (GISC). It published the GISC code which set out minimum standards of good practice for its members to follow when selling insurance, including PPI. C&G was a member of GISC when it sold Mr and Mrs G's policy.

41. Of particular relevance to this dispute:

- Among other things, members promised that they would:
    - *'act fairly and reasonably when we deal with you;*
    - *make sure that all our general insurance services satisfy the requirements of this Private Customer Code;*
    - *make sure all the information we give you is clear, fair and not misleading;*
    - *avoid conflicts of interest or, if we cannot avoid this, explain the position fully to you;*

[1] *Plevin v Paragon Personal Finance Limited [2014] UKSC 61*

- *give you enough information and help so you can make an informed decision before you make a final commitment to buy your insurance policy...'*

– Under the heading 'helping you find insurance to meet your needs':

'We will give you enough information and help so you can make an informed decision before you make a final commitment to buy your insurance policy.

…

Matching your requirements

3.2 We will make sure, as far as possible, that the products and services we offer you will match your requirements.

- *If it is practical, we will identify your needs by getting relevant information from you.*
- *We will offer you products and services to meet your needs, and match any requirements you have.*
- *If we cannot match your requirements, we will explain the differences in the product or service that we can offer you.*
- *If it is not practical to match all your requirements, we will give you enough information so you can make an informed decision about your insurance.*

Information about products and services

3.3 We will explain all the main features of the products and services that we offer, including:

…
- *all the important details of cover and benefits*
- *any significant or unusual restrictions or exclusions;*
- *any significant conditions or obligations which you must meet; and*

…

Information on costs

3.4 We will give you full details of the costs of your insurance including…

…
- *if we are acting on your behalf in arranging your insurance and you ask us to, we will tell you what our commission is and any other amounts we receive for arranging your insurance or providing you with any other services.*

…

Advice and recommendations

3.5 If we give you any advice or recommendations, we will:

- *only discuss or advise on matters that we have knowledge of;*
- *make sure that any advice we give you or recommendations we make are aimed at meeting your interests; and*
- *not make any misleading claims for the products or services we offer or make any unfair criticisms about products and services that are offered by anyone else.'*

The Mortgage Code

42. The Mortgage Code was a voluntary code followed by subscribing lenders and mortgage intermediaries. Whilst predominantly about mortgage related matters, it also included some insurance related commitments.

43. Among other things, the Mortgage Code said that when providing information to help customers choose a mortgage, subscribers would give customers:

- *'…a description of any insurance services which we can arrange (for example, buildings, contents, mortgage payment protection and life insurance);*
- *whether it is a condition of the mortgage that such insurance be taken out and whose responsibility it is to ensure that it is taken out*;
- *whether it is a condition of the mortgage that such insurance must be arranged by us;*
- a *general description of any costs, fees or other charges in connection with the mortgage which may be payable by you (for example, mortgage valuation fees, arrangement fees, early repayment charges, legal fees and insurance premiums)'*.

44. Subscribing lenders (but not mortgage intermediaries) also agreed to comply with relevant codes including the ABI Code (below).

The Association of British Insurers' General Insurance Business Code of Practice for all intermediaries (including Employees of Insurance Companies) other than Registered Insurance Brokers' – 'The ABI Code'

44. First introduced in 1989 and updated in March 1996, the ABI Code set out a framework of general principles within which ABI members and intermediaries were expected to sell general insurance, including payment protection policies like this. Among other things, it said that:

- *'It shall be an overriding obligation of an intermediary at all times to conduct business with utmost good faith and integrity.'*

- The intermediary should:

  - *'ensure as far as possible that the policy proposed is suitable to the needs and resources of the prospective policyholder.'*

- *'explain all the essential provisions of the cover afforded by the policy, or policies, which he is recommending, so as to ensure as far as possible that the prospective policyholder understands what he is buying.'*

- *'draw attention to any restrictions and exclusions applying to the policy.'*

Guidance on the application of the ABI Code

45. The ABI also issued guidance to member companies on the application of the ABI code and a note summarising the main points of that guidance.

46. The 'Guidance Notes for Intermediaries' issued in December 1994 included:

> *When selling insurance intermediaries must*
>
> *...2.5 Explain the essential provisions of the insurance cover, draw attention to any restrictions and exclusions under it, as well as the consequences of non-disclosure…*
>
> *…2.13 If an independent intermediary, disclose commission on request…*

47. The 'Resume for Intermediaries' published in July 1999 explained how insurers should interpret some of the key requirements of the ABI Code including:

> *"Explain all the essential provisions"*
> *It is necessary for the intermediary (insurer, if dealing direct) to provide an overview of the policy. The detail will vary depending on the particular class of insurance. However, the proposer should have a reasonable understanding of what he is buying, whether this is explained orally or whether he is given a summary and his attention drawn to the main points. In this respect, it is important to recognise the responsibility under the ABI Statement of General Insurance Practice that insurers will work towards clearer policy wordings.*
>
> *The intermediary is not expected to go through all the provisions and exclusions in detail. The important feature is to identify the level of cover being provided (for example, in the case of household contents whether it is "indemnity" or "new for old"), that the type of policy being sold suits the circumstances of the proposer and the*
> *level of protection they are seeking as far as possible. It is not good enough simply to offer, for example, an indemnity basis of cover without explaining the limitations and, indeed, that other options are available, unless, of course, the proposer wittingly asks for that type of cover.*
>
> *"Draw attention to any restrictions and exclusions"*
> *The same general principles outlined above apply equally here. Certain exclusions, conditions, restrictions etc under a particular policy will be common to all policyholders, for example, a condition about fraud. In those circumstances, it would not be necessary to identify these other than by reference to general exclusions applying to all policyholders of a particular type of insurance, either orally or in policyholder documentation.*

However, some will be more relevant and, indeed, significant to certain but not other policyholders. An example would be where benefit to self-employed people is either excluded or severely restricted for redundancy cover under a creditor insurance policy. Clearly, self-employed people should be made aware of this so they can decide whether the other benefits under the policy and the premium to be paid justifies taking out such a policy.

The ABI Statement of Practice for Payment Protection Insurance

48. The ABI also published a statement in December 1996 about PPI. Among other things, it said:

Providers will give sufficient detail of the essential provisions of the cover afforded by the policy so as to ensure, as far as is possible, that the prospective insured person understands what he/she is buying.

In particular:

the suitability of a contract will be explained to those who are self-employed, those on contract or part time work, and those with pre-existing medical conditions;

details of the main features of the cover as well as important and relevant restrictions will be made available and highlighted at the time the insurance is taken out with full details being sent afterwards;

all written material will be clear and not misleading;

full details of the cover will be provided as soon as possible after completion of the contract.

The ABI and CML Statement of Practice for Sales of Mortgage Payment Protection Insurance

49. The ABI jointly published a statement with the Council of Mortgage Lenders in July 1999. Among other things, it said:

Is the policy suitable for the consumer?

The ABI Code requires sellers of MPPI to ensure as far as possible that the insurance policy being proposed is suitable for the prospective insured person's needs and resources.

This means the customer should be encouraged to assess the levels of risks they face as a homeowner, and particularly how they would keep up mortgage repayments if they lost their income via unemployment or ill health. Issues that need to be addressed during the sales process include:

- *security of the customer's employment, bearing in mind the duration of financial commitment they are about to undertake,*
- *what level of sick pay they could expect from their employer if they fell ill, and*

- *whether they have savings or alternative sources of income.*

This type of information will help customers to decide whether they need MPPI, and which kind of policy would be best for them.

Does the customer understand what he/she is buying?

Sellers of MPPI must explain all the essential provisions of the policy, including restrictions and exclusion, at the point of sale.

The key aims at the point of sale should be to identify:

- *The level and type of cover being provided. This includes benefit levels and whether they cover disability and/or unemployment, length of time for which payments will be made and the duration of the policy in relation to the mortgage.*
- *All the main restrictions and exclusions. These include any eligibility criteria, conditions relating to pre-existing health conditions, time limits relating to claim payments and age restrictions.*

The needs of individual customers may vary. For example, self-employed or contract workers will need to understand clearly any restrictions that apply to them and affect their cover. Wherever possible, sellers should take account of individual circumstances and adjust the information they provide accordingly.

50. The other codes produced by the ABI supplemented the ABI Code and I also consider them to be indicative of the standards of good practice expected of intermediaries like C&G at the time.

51. So I am satisfied I should take the GISC Code, Mortgage Code and ABI Code and the other ABI publications into account when deciding what is, in my opinion, fair and reasonable in the circumstances of Mr and Mrs G's case.

52. Whilst I note C&G's representations about the status of the GISC Code and the various ABI and CML publications, I am satisfied they are relevant considerations in their own right to be taken into account when deciding what is in my opinion fair and reasonable (either as relevant codes of practice, or as indicators of good practice), and not just to the extent that a court might take them into account when considering the existence or standard of a common law duty of care.

The law

53. I have also taken account of the law, including: the law relating to negligence, misrepresentation and contract (including the express and implied duty on professional advisers to give advice with reasonable skill, care and diligence); the law relating to the duty of utmost good faith; and the law relating to causation and remoteness.

54. I have also considered carefully the parties' representations about the law set out in a number of documents including most recently C&G's letter of 10 August 2017 and WFAC's letters of 9 May and 11 August 2017 in relation to Mr and Mrs G's

complaint and its letters to this office about complaints generally of 2 March and 5 June 2017.

The FCA's guidance for firms Handling PPI complaints – DISP App 3

55. I am also mindful of the evidential provisions and guidance set out at DISP App 3, first issued by the FSA in 2010, which sets out how firms should handle complaints relating to the sale of payment protection contracts like Mr and Mrs G's.

56. The sale took place before insurance mediation became a regulated activity in January 2005, so C&G was required to take into account the evidential provisions in DISP App 3 as if they were guidance when considering Mr and Mrs G's complaint.

57. I note DISP App 3 includes guidance for firms about assessing a complaint in order to establish whether the firm's conduct of the sale fell short of the regulatory and legal standards expected at the time of sale – referred to as 'breaches or failings'. It did not impose new, retrospective, expectations about selling standards.

58. DISP App 3 also contains guidance for firms about determining the way the complainant would have acted if a breach or failing by the firm had not occurred. In relation to that it says:

> *DISP App 3.1.3G*
> *Where the firm determines that there was a breach or failing, the firm should consider whether the complainant would have bought the payment protection contract in the absence of that breach or failing. This appendix establishes presumptions for the firm to apply about how the complainant would have acted if there had instead been no breach or failing by the firm. The presumptions are:*
>
> > *(1) for some breaches or failings (see DISP App 3.6.2 E), the firm should presume that the complainant would not have bought the payment protection contract he bought; and*
> >
> > *(2) for certain of those breaches or failings (see DISP App 3.7.7 E), where the complainant bought a single premium payment protection contract, the firm may presume that the complainant would have bought a regular premium payment protection contract instead of the payment protection contract he bought.*
>
> *DISP 3.1.4G*
> *There may also be instances where a firm concludes after investigation that, notwithstanding breaches or failings by the firm, the complainant would nevertheless still have proceeded to buy the payment protection contract he bought.*

DISP App 3.6.1E
Where the firm determines that there was a breach or failing, the firm should consider whether the complainant would have bought the payment protection contract in the absence of that breach or failing.

DISP App 3.6.2E
In the absence of evidence to the contrary, the firm should presume that the complainant would not have bought the payment protection contract he bought if the sale was substantially flawed, for example where the firm:

…(4) did not disclose to the complainant, in good time before the sale was concluded, and in a way that was fair, clear and not misleading, the significant exclusions and limitations, i.e. those that would tend to affect the decisions of customers generally to buy the policy;

…(8) did not disclose to the complainant, in good time before the sale was concluded and in a way that was fair, clear and not misleading, the total (not just monthly) cost of the policy separately from any other prices (or the basis for calculating it so that the complainant could verify it);

…(10) provided misleading or inaccurate information about the policy to the complainant;

DISP App 3.6.3E

Relevant evidence might include the complainant's demands, needs and intentions at the time of the sale and any other relevant evidence, including any testimony by the complainant about his reasons at the time of the sale for purchasing the payment protection contract.

Overall

59. Taking the relevant considerations into account, it seems to me that the overarching questions I need to consider in deciding what is in my opinion fair and reasonable in all the circumstances of this complaint, are:

- If C&G gave advice, whether it advised Mr and Mrs G with reasonable care and skill – in particular, whether the policy was appropriate or 'suitable' for Mr and Mrs G, given their needs and circumstances.

- Whether C&G gave Mr and Mrs G sufficient, appropriate and timely information to enable them to make an informed choice about whether to take out the policy, including drawing to their attention and highlighting – in a clear, fair and not misleading way – the main provisions of the policy and significant limitations and exclusions.

- If, having considered these questions, I determine the complaint in favour of Mr and Mrs G, I must then go on to consider whether and to what extent Mr and Mrs G suffered loss or damage and what I consider would amount to fair compensation for that loss or damage.

60. Mr and Mrs G say C&G ought fairly and reasonably to have gone further than I have suggested. I shall address Mr and Mrs G's representations about this later on.

61. C&G has suggested these overarching questions incorrectly draw upon the wording of subsequent regulatory requirements such as the FCA Principles for Businesses. I do not agree.

62. I accept the FCA's Principles for Businesses place similar requirements on businesses carrying on regulated activities to the overarching questions I have set out here. But, for the reasons I have explained, the Principles for Businesses do not apply to this complaint and I have not taken them into account. Rather, I have distilled the overarching questions from the various relevant considerations which do apply, which I have set out above.

b) the sale - what actually happened?

63. Mr and Mrs G attended a meeting in a branch of C&G. They were looking to re-mortgage and to refinance existing debt.

64. Mr and Mrs G say the policy was sold in that meeting. They say they discussed the mortgage terms, the firm did not give them advice or recommend they take out the policy and they did not receive any documentation about the policy during the sale. They say it was included in a package with the mortgage.

65. C&G says that, as the sale took place in a branch, an adviser would have given advice and made recommendations based on information provided by Mr and Mrs G.

67. C&G has provided copies of a number of documents that were completed during the meeting:

- The Loan Assessment Form which included a section headed *'SALES'.* This included a series of ticked boxes which suggest that Mr and Mrs G were sold Payment Protection Plus, but were using their own nominated company for buildings and contents insurance. There are some notes about the loans, but no references to the policy or what Mr and Mrs G were told about it.

- The mortgage application form (headed 'Choosing your mortgage'), which Mr and Mrs G signed included an 'insurance' section. This indicates that Mr and Mrs G did not want C&G to arrange their home insurance, but they wanted payment protection cover. The form also suggests that Mr and Mrs G had chosen their mortgage based on information provided by C&G, but had not been given advice about that.

- The Payment Protection Plus proposal form which Mr and Mrs G signed on the same day. This says the total amount of the loans to be covered by the policy was £35,695. The third section of the form deals with how the benefit of the cover should be split. It states that the first customer (Mr G) was to be insured for 100% of the mortgage costs. It included the statement: *'Full details of the terms and conditions of this insurance are contained in the statement of cover booklet which will be sent to you once your proposal for*

insurance has been accepted.' The second page headed 'office use only' notes the cost as £17.85 per month (with £17.84 crossed out).

- The loan agreements (although these make no mention of the policy).

68. Having considered the representations of both sides and keeping in mind the limitations on the evidence available about what happened during a meeting around 15 years ago, I find:

    - Whilst it is possible that C&G may not have provided any advice about the policy, it is more likely than not that it did in the circumstances of this case. In reaching that conclusion I have taken into account the representations of both sides on this point. I am mindful that Mr and Mrs G's recollections of what happened in 2002 appear, understandably, to be limited – for example, as I have already mentioned, I am satisfied they are mistaken about how much they earned and the identity of Mrs G's employer in 2002. And, whilst I cannot be certain about what happened, I think it is more likely that C&G's representations – that it recommended the policy to Mr and Mrs G – are more likely to reflect what actually happened, given its knowledge of its usual branch sales processes at the time.

    - It is more likely than not that there were some discussions about the policy C&G was recommending at the meeting between Mr and Mrs G and the adviser. Mr and Mrs G may not have known all there was to know about the policy, but it is unlikely they took out the policy without knowing anything about it at all.

    - It is more likely than not that the full policy conditions were sent to Mr and Mrs G after the meeting.

c) did things happen as they should in 2002?

69. For reasons I shall explain, I consider it is more likely than not that C&G fell short of what was reasonably expected of it. Exactly how, and the extent to which, C&G fell short and its relevance to Mr and Mrs G, is in my view important to my consideration of the question which ultimately lies at the heart of this complaint: would Mr and Mrs G have acted differently if C&G had advised and explained things properly?

70. Having considered the evidence from the time of sale and the parties' representations about what happened, I am satisfied it is more likely than not that Mr and Mrs G agreed to the policy C&G recommended knowing that they did not have to take it out and that it was separate to the mortgage.

71. In reaching that conclusion, I note the mortgage application form included two options:

    I wish to apply for C&G Payment Protection Plus cover and have completed the relevant proposal form at the back of this form.

    I do not wish to take out C&G Payment Protection Plus cover. C&G have explained to me the consequences of not having protection to cover my

mortgage commitments should I become unemployed or unable to work because of sickness or an accident.

Whilst it appears the adviser completed the application form for Mr and Mrs G to sign (and it seems likely ticked the first of these boxes), I am also mindful that: there were two options, there was a separate insurance proposal form and direct debit form, and Mr and Mrs G retained their own home insurance arrangements and it would appear those arrangements were also discussed.

72. On the balance of probabilities, I consider it more likely than not that the adviser presented the policy as an optional extra to the mortgage, albeit insurance the adviser recommended Mr and Mrs G take out. I am not persuaded it is more likely than not that the C&G's adviser incorrectly (or inadvertently) told Mr and Mrs G they had to agree to the payment protection policy for the mortgage to be approved or that the insurance was an inseparable feature of the mortgage.

73. I have concluded C&G recommended the policy to Mr and Mrs G, so I consider it appropriate to consider whether it advised Mr and Mrs G with reasonable care and skill, in particular whether the policy was appropriate or 'suitable' given their needs and circumstances.

74. I cannot say for certain what steps C&G took to establish whether the policy was a suitable recommendation for Mr and Mrs G. Mr and Mrs G say that C&G did not give them advice and the adviser did not make any notes about what was discussed in relation to the policy. The adviser had information about some of Mr and Mrs G's financial circumstances, but there is not any specific evidence to show that the adviser took steps to establish whether Mr G would have been caught by the significant exclusions and limitations which might have meant the policy did not fully meet Mr and Mrs G's needs. For example, there is nothing to suggest C&G considered whether Mr G had any pre-existing medical conditions.

75. Overall, I am not persuaded on the balance of probabilities that C&G did all it should have done to determine whether the policy was suitable for Mr and Mrs G given their circumstances. So in that sense, I am not persuaded C&G advised with reasonable care and skill.

76. Whilst I am not persuaded C&G did all it should have done to determine whether the policy was suitable for Mr and Mrs G, I am satisfied it is more likely than not that the policy was ultimately suitable for them given what I am satisfied were Mr and Mrs G's needs and circumstances at the time. In reaching that conclusion I have taken into consideration:

- Mr G met the eligibility criteria for the policy.

- Mr and Mrs G had a need for the policy – Mr G was the main wage earner and it seems likely that Mr and Mrs G's finances would be put under strain if he were not working – even allowing for the sickness and redundancy benefits he was entitled to and Mrs G's income. The policy would have helped Mr and Mrs G manage the consequences were Mr G unable to work.

- Although the benefit split meant the policy only provided cover for Mr G, he was the main wage earner and the Loan Assessment Form notes that the borrowing was secured on his income alone. So I do not think it unreasonable

to recommend the policy be set up on the basis it was.

- The monthly premium of £17.85 was affordable for Mr and Mrs G given the mortgage itself was affordable based on Mr G's salary alone. The adviser also noted the following on the Loan Assessment Form: *"Well within capacity to repay. All loans up to date. No arrears."*

- The exclusions and limitations did not make the policy unsuitable for Mr G. There was nothing about Mr G's employment or occupation which would have made it difficult for him to claim. Mr G did not have any pre-existing medical conditions (he has separately told us about some issues he had as a child such as chicken pox, measles and mumps but I do not consider these would be deemed to have still existed at the time of taking the policy out some 40 to 50 years later if enquiries had been made) and there were no additional restrictions on the cover for mental health or back problems.

- Whilst – as Mr and Mrs G have reiterated in their response to the Provisional Decision – there were limits to the cover provided by the policy (including: the 'any similar gainful occupation' condition, the requirement that Mr G be disabled or unemployed for 60 days before he could make a claim and the fact the policy would only pay benefits for a maximum of 12 months for each claim), even if he remained unemployed or unable to work though disability after that point, the policy still provided valuable cover given:

    - Mr and Mrs G's circumstances, including his employer's sickness and redundancy provisions (which he might expect to provide income during the policy's 60-day qualification period) and the limits to those provisions, which meant the policy could play an important role after those provisions were exhausted; and

    - the fact the policy protected the mortgage repayments relating to their house and the potential consequences should Mr and Mrs G be unable to make the repayments on loans secured against their house.

77. I have also considered whether when providing advice C&G gave Mr and Mrs G sufficient information about the cover provided by the policy to enable Mr and Mrs G to understand what C&G was recommending to them and make an informed decision about whether to follow that advice and take out the policy.

78. I am satisfied it is more likely than not that Mr and Mrs G were given a broad description of what the policy was intended to cover (that is that the policy would protect their payments if Mr G was unable to work through accident, sickness and disability) and of the approximate costs. I have reached this conclusion because I think it is unlikely that Mr and Mrs G would have taken out the policy without any sense of what the policy was for and of how much the premium might be.

79. But the evidence from the time of sale does not tell us whether C&G gave sufficient information about the actual monthly benefit, the actual cost or about the exclusions and limitations before Mr and Mrs G agreed to take out the policy. The limited evidence there is (on the Proposal Form) suggests that C&G relied on the terms and conditions set out in the Statement of Cover booklet sent to Mr and

Mrs G once the proposal for insurance had been accepted to deliver that information.

80. Whilst I am satisfied C&G sent Mr and Mrs G the full policy conditions which gave information about the benefits, limitations and exclusions after they applied for it, I do not consider that means C&G gave Mr and Mrs G the information they fairly and reasonably needed to make an informed decision about whether to follow the recommendation and take out the policy. I am mindful:

- Mr and Mrs G did not base the decision they made at the meeting to take out the policy on the full policy conditions.
- There is nothing to suggest Mr and Mrs G were forewarned that they should delay making a final decision about the policy until they had received and considered the contents of that document.
- It was incumbent on C&G to provide them with the most important information they required to make their decision before they took out the policy (see the good practice I set out earlier).

81. Overall, having considered the parties' representations about what happened, whilst I am satisfied that the policy was a suitable recommendation for Mr and Mrs G, I am not persuaded C&G did enough to present information about the policy it was recommending in a way that was fair and reasonable to Mr and Mrs G. I am not persuaded C&G gave Mr and Mrs G all of the information they needed about the policy to make an informed decision about whether to follow the recommendation and take out the policy.

82. In reaching these conclusions, I am mindful of the representations made by C&G suggesting that it did all it was legally required to do by providing the information to Mr and Mrs G – it suggests it did not have to go further and that Mr and Mrs G ought to have read the terms and conditions sent to them after they applied for the policy. Whilst I am mindful of C&G's view, I am satisfied the standards of good practice established by the various ABI publications and ordinary dealings with consumers meant C&G ought fairly and reasonably to have done more than it did to draw the important information about the policy to Mr and Mrs G's attention before they decided to take out the policy.

83. I have considered how my findings interact with the FCA's list of significant failings in its guidance for firms handling PPI complaints set out at DISP App 3.

84. It seems to me that it would be reasonable to conclude that there were significant failings in this case. C&G did not, for example, disclose to Mr and Mrs G before the sale was concluded and in a way that was clear, fair and not misleading the significant limitations and exclusions that would tend to affect the decision of customers generally to take out the policy [DISP App 3.6.2E(4)]. And, even though the policy might have been affordable overall for Mr and Mrs G, C&G may also have failed to disclose the cost information envisaged at DISP App 3.6.2E(8).

85. I have considered carefully Mr and Mrs G's arguments that C&G should have done more than I have found it should have done and provided additional

information. I have given particular thought to Mr and Mrs G's view that the common law duty of utmost good faith meant that:

- C&G should have explained the low claims ratio (and what they consider to be the inherent poor value) and the fact much of the premium went to C&G rather than the insurer.

- C&G should have told them not just about the limitations and exclusions, but also about the significance of them.

C&G did have to consider the features of the policy and weigh up the significance of the exclusions and limitations to ensure the policy it was recommending was suitable for Mr and Mrs G's needs and resource and it also had to explain the features of the cover. But I am not persuaded by Mr and Mrs G's views about what the duty of utmost good faith required.

86. Under the law which existed at the time, both parties to an insurance contract owed a duty of utmost good faith to the other. By way of summary only, both parties had duties to disclose material facts and to refrain from making material misrepresentations to the other.

87. Usually, the focus of any dispute tends to be on the extent of the obligations the duty of utmost good faith places on the person seeking insurance to disclose to the insurer the information it needs to determine and calculate the risk it will be taking if it agrees to provide the insurance.

88. But an insurer also has a duty to disclose:

> *…all facts known to him which are material either to the nature of the risk sought to be covered or the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether or not to place the risk for which he seeks cover with that insurer.*[2]

89. MacGillivray on Insurance Law[3] explains that the duty does not extend to giving the insured the benefit of the insurer's market experience, such as for instance, that the same risk could be covered for a lower premium either by another insurer or, presumably, by the same insurer under a different type of insurance contract; and the insurer is not required to perform the role of the insured's broker in this regard.

90. I cannot be certain, but I think it is unlikely a court would conclude an insurer should have disclosed the claims ratio and 'value' information, or contextualised the information about the limitations on disability cover in the way Mr and Mrs G say C&G should have done by virtue of the duty of utmost good faith. In any event, I do not think it would be fair or reasonable in the circumstances of this case to impose such requirements on C&G. I note that in response to the Provisional Decision, Mr and Mrs G consider this to misstate the legal position. I do not agree with this representation.

---

[2] *Banque Keyser Ullmann SA v Skandia (U.K.) Insurance Co. Ltd [1990] 1Q.B. 665, 772*

[3] MacGillivray on Insurance Law 13th edition 17-094

91. C&G was not the insurer in this transaction. Regardless, the ABI Code also referred to an overriding duty on the intermediary to act with utmost good faith and integrity.

92. The Guidance Notes for Intermediaries and the Resume for Intermediaries about the application of the ABI Code which I have referred to in this decision do not refer to that duty or elaborate on what it was intended to mean. But I think it is unlikely that it was intended to place a greater or substantially different obligation on the intermediary to that owed by the insurer.

93. I consider it more likely than not that the reference to an overriding duty on the intermediary was a reminder of the importance of disclosing material information to both the insurer and the insured (depending on whom the intermediary was acting for), reflecting the legal duty those parties were under. And it seems likely the provisions of the ABI Code were in effect intended to be practical examples of how the intermediary might meet the overarching principles of utmost good faith and integrity as well as expected standards of good practice.

94. I also note there was no expectation at the time under the provisions of the ABI Code or the GISC Code that insurers or intermediaries should proactively disclose commission. For example, the guidance to the ABI Code published in December 1994 said only that independent intermediaries should disclose commission on request and the GISC Code said that members would disclose information about commission and other amounts received on request.

95. Nor do I consider it can reasonably be inferred from the ABI Statement of Practice for Payment Protection Insurance (which gave further information about the expectations in PPI sales) that insurers or intermediaries were expected to disclose the kind of information Mr and Mrs G say C&G should have done.

96. So it seems very unlikely that it was ever the intention of the ABI Code that intermediaries should provide the kind of additional information Mr and Mrs G suggest it should. In any event, I am not of the view that it would be fair and reasonable in the circumstances of the case to impose a greater or substantially different obligation on the intermediary to that owed by the insurer.

97. I also note Mr and Mrs G's view that C&G misrepresented the terms of the policy in the Payment Protection Plus Proposal Form where, under the heading 'details of cover required', Mr and Mrs G were asked to specify the percentage of the monthly mortgage payment they would each like to be insured for. The preprinted form was completed (by inserting '100%' in the space provided) to say *'First customer* [Mr G] *I wish to be insured for 100% of our mortgage costs'.* Mr and Mrs G say – in essence – this was misleading because there were significant limitations on when the policy would pay out and on the period of cover – it wouldn't cover 100% of their ongoing mortgage costs in the event of a claim.

98. But I am mindful that:

    - A court when considering a misrepresentation claim would ordinarily look at all of the information Mr and Mrs G were given. The Proposal Form explained – immediately after the line Mr and Mrs G have referred to that *'Full details of the terms and conditions of this insurance are contained in the statement of cover*

booklet which will be sent to you once your proposal for insurance has been accepted'.

- As I have explained, the policy would cover the monthly loan payment (in other words the mortgage costs) in full and provide an additional cash benefit for up to 12 months. Whilst there were limitations on cover, the policy did provide cover in a variety of circumstances.

- The particular question Mr and Mrs G have referred to concerned the amount of the monthly mortgage payment Mr and Mrs G wanted the policy to meet in the event that either of them made a claim with – as the Proposal Form explained – the total needing to add up to 100% of the monthly mortgage payment, rather than a question or statement about the period of a claim.

99. Whilst I accept there is a possibility a court might conclude C&G mis-represented the contract, in my opinion the reason why C&G failed to act fairly and reasonably was because the overall information it gave Mr and Mrs G, in the way it did, was insufficient to meet the standards I consider it fair and reasonable to expect it to have met, in 2002, when providing information about an insurance policy.

100. Overall, for the reasons and in the ways I have set out, I find the information C&G gave Mr and Mrs G, in the way it did, was insufficient.

101. In particular, C&G failed to explain in a clear way all the features of the policy it was recommending, which meant the information Mr and Mrs G based their decision on was incomplete. I am not persuaded these shortcomings were fair and reasonable in all the circumstances.

e) what effect did C&G's shortcomings have on Mr and Mrs G?
to what extent did Mr and Mrs G suffer loss or damage as a result?

102. I have found C&G did not do all it should fairly and reasonably have done when it sold this policy to Mr and Mrs G, so I have gone on to consider whether it would be fair and reasonable to conclude Mr and Mrs G suffered loss and damage as a result.

103. Whilst I am not persuaded that C&G took the steps it should have done to establish whether the policy it recommended was suitable for Mr and Mrs G, I have found that the policy was ultimately suitable for them.

104. In those circumstances, it seems to me that whether or not Mr and Mrs G have suffered loss or damage in this case primarily depends on whether, if C&G had explained things properly, Mr and Mrs G would have acted differently, or whether they would have taken out the policy in any event.

105. Mr and Mrs G say they would not have taken out the policy and I should, in any event, presume that they would not have taken it out given the substantial failings in the sales process I have identified (unless C&G can produce evidence to show they would have taken out the policy, which Mr and Mrs G says it cannot because its failings were so fundamental).

106. Mr and Mrs G also say that a court would take a different approach if it were to find there were misrepresentations. For example, Mr and Mrs G's representative, WFAC, cited certain selected passages from *Raiffeisen v RBS* [2010] EWHC 1392 (Comm) in its letter of 11 August 2017:

*'The correct test for rescission in misrepresentation is not: "what would the innocent party have done if he had been told the truth?" (FOS's approach) but: "were the misrepresentations a real/substantial cause of the innocent party entering into the contract at all/in those terms, even if there were other causes, such that but for the misrepresentation the innocent party would probably not have entered into the contract/in those terms?": **Raiffeisen** at 153-191. In particular, in the misrepresentation context, it is irrelevant to ask how the innocent party would have acted if the misrepresentations had not been made (**Raiffeisen** at 186-190).'*

107. I have considered the representations of both sides and the evidence relating to this carefully.

108. Deciding whether to follow advice to take out insurance requires the consumer to weigh up a number of factors before deciding whether to proceed.

109. Effectively the consumer has to weigh up the advice to take out the policy, the cost of doing so given the benefits offered in return and the potential consequences they will suffer if they don't have insurance should the risks come to fruition. That is why it was incumbent on the intermediary to provide the information about the policy's features when recommending the policy, so the consumer could make that assessment.

110. The evidence in this case suggests that Mr and Mrs G clearly had some interest in taking out payment protection insurance. In saying that, I do not mean they actively sought insurance or that it was their intention to take out insurance before they applied for the mortgage – I have seen nothing to suggest they did.

111. Rather, I mean when C&G advised them that there was a suitable product they could buy that would protect their mortgage payments in the event they were unable to work because of accident, sickness or unemployment, that resonated with them in some way and they concluded that they wanted that product to provide cover for Mr G.

112. The issue here is that the decision they made about whether to accept C&G's recommendation was based on incomplete information, meaning what they thought they were getting is not exactly what they got. And they would have had different things to weigh up when deciding to take out the policy if C&G had told them everything it should have done about the policy it was recommending.

113. I consider that in deciding what is fair and reasonable in this case and whether Mr and Mrs G suffered loss or damage as a result, the evidence about the extent to which the product differed from what Mr and Mrs G might reasonably have expected from what they were told, is relevant to the consideration of what would have happened.

114. In this case, as I explained earlier, I am satisfied from the evidence about Mr and Mrs G's circumstances at the time of the sale that the policy was not fundamentally wrong or unsuitable for them.

115. Whilst Mr and Mrs G were interested in the policy, were eligible and had good reason for wanting the cover provided by a suitable policy, the policy did not work entirely as they might have thought.

116. Although I consider it more likely than not that Mr and Mrs G knew they would have to pay something for the policy, it does not appear C&G told them the exact premium at the point Mr and Mrs G applied for the policy. Having said that, it seems likely Mr and Mrs G would have been told the cost before the policy started and they paid for the policy for a number of years, so if the costs were significantly at odds with their expectations at the point of sale, it is possible they might have raised that with C&G at the time, or reconsidered their decision.

117. Overall, I am not persuaded Mr and Mrs G would have found the cost unacceptable if they had been given the exact figure during the meeting in which they agreed to the policy.

118. In addition, I am not persuaded C&G made clear exactly what Mr and Mrs G would get back in return in the event they made a successful claim. But I think it is unlikely Mr and Mrs G's likely expectations about what the policy would pay in the event of a claim (an amount sufficient to meet their monthly mortgage payment) were significantly different to what the policy actually did – if anything, it is more likely than not that the policy actually paid more in the event of a claim than they would have expected as there was an additional cash payment.

119. I am not persuaded C&G explained the limitations and exclusions to Mr and Mrs G either. But I do not think it is more likely than not that the limitations and exclusions there were would have dissuaded Mr and Mrs G from taking out the policy.

120. Mr G did not for example have any pre-existing medical conditions and the policy did not exclude back or mental health conditions, or place any additional restrictions or more onerous evidential requirements in the event of a claim on those grounds than would have applied to any other disability claim. And I think it is unlikely Mr and Mrs G would have expected to make a disability claim on the policy without having to provide some evidence to support that claim.

121. More significantly I am not persuaded C&G told Mr and Mrs G that any claim they made would be limited to a 12-month period. This may have differed from what Mr and Mrs G expected and might have hoped for. But 12 months was a longer period than Mr G would have received full sick pay for and his statutory redundancy entitlement was also significantly less than 12 months' income – and those payments would, in part, be used during the 60-day policy qualification period. The 12-month claim period would also allow them time to explore other income options, for example to find a new job, in the event of an unemployment claim.

122. In those circumstances, I consider it likely – even taking into account as Mr and Mrs G have reiterated in response to the Provisional Decision that two of the three loans were due to run for 8 years – that Mr and Mrs G would still have thought a policy that paid up to 12 monthly mortgage payments per claim would have been of benefit to them and would help them manage the consequences should Mr G be unable to work in the circumstances covered by the policy. The policy allowed for multiple claims to be made, it could help reduce their outgoings at a difficult and uncertain time, ensure that their home was not placed at risk and might potentially help preserve Mr G's limited sick pay or redundancy money for other use.

123. So, whilst Mr and Mrs G did not know some things about the policy, I am satisfied the ultimate position in the event of a successful claim was not dissimilar to what they would reasonably have thought from the advice and information they based their decision to take out the policy on and found acceptable.

124. The terms of the policy also differed from what Mr and Mrs G might have expected because Mr G could only claim for disability if he was unable to do both his own job and 'any similar gainful occupation' which in the insurer's view he might reasonably become qualified for. If Mr and Mrs G had known this, it may have played into their thinking about what they would have done, and how this restriction may have affected them. And I accept it may have given them pause for thought – although it is possible they may not have been overly concerned given that if Mr G was unable (through disability) to carry on his own occupation the chances that he would be able to take up a similar occupation would also, in all probability, be limited.

125. Mr and Mrs G provided information in the PPI questionnaire about what they would have done with more information, which I have considered carefully. In their most recent updated questionnaire, they say:

> [C&G] *did not explain the terms and conditions of the policy. In particular they did not tell us the exclusions and limitations – the reasons it would not have paid out. WFAC say* [C&G] *had a duty to explain these exclusions and limitations in a way that ordinary people like us would have understood. We can definitely say that* [C&G] *did not do this. WFAC have further explained that a high proportion of reasons anyone is likely to miss work were often excluded – in particular pre-existing conditions and often chronic conditions and sometimes common condition such as bad backs and mental health conditions such as stress, depression and anxiety. These statistically are among the most likely reasons for anyone being off work and I can say that these exclusions were not disclosed to us.*
>
> *If* [C&G] *had said that they were excluding some of the most common reasons people miss work we can say that we would not have wanted this PPI for that reason alone.*
>
> *This policy was meant to protect our mortgage from sickness. It is now obvious that it was never going to do what it was supposed to. It was supposed to protect payments if you couldn't work, but wouldn't have done that in a majority of cases.*
>
> *Let us be clear – we would not have wanted this policy had we been told this. On top of this, we also now understand 'pre-existing conditions' were not covered. This sounds like a piece of jargon to us, but WFAC have explained what it meant. We have had the following health problems:*
>
> [Mrs G]

Condition: mumps, Date: circa 1952, Treatment: none, Meds (inc. non-prescription): aspirin, Work missed: none

Condition: measles, Date: circa 1952, Treatment none, Meds (inc. non-prescription): aspirin, Work missed: none

Condition: tonsilectomy [sic]. *Date circa 1956. Treatment I went to the hospital, Meds (inc. non-prescription): I had an operation, Work missed: none.*

If the exclusion for pre-existing medical conditions had been explained to us, it is clear we would not have wanted this policy.

On top of this we now understand that on average, firms kept 65% + of each premium payment as profit and expenses. The policy was appalling value for money. We are not in a position to waste money or make insurance businesses richer at our expense. Everyone knows that companies are entitled to make a fair profit, but not
an unfair one – We would not have wanted to be taken advantage of. We don't think anybody would.

In addition to the above, there are more reasons as well why we now understand this PPI should not have been sold to us, and why if it had been explained properly, we would not have wanted it.

In my job as a warehouse assistant, I had sickness cover – see above. In [Mr G's] *job as a warehouse manager they had sickness cover – see above. They also had redundancy and would have got at least redundancy pay if they had been made redundant.*

So the PPI was expensive and really unlikely to pay out and on top of that we were covered anyway.

As well as everything else, we were financially stretched. In fact we have struggled to pay our debts and gone into arrears. WFAC say that for us, even more than anybody else, it was wrong for us to spend money on this PPI which was both really expensive, and unlikely to pay out.

We don't think this PPI should have been sold to us and would not have wanted it if it had been properly explained. WFAC says that [C&G] *were supposed to treat us fairly and not take advantage of us, but it cannot be right to sell a product like this without explaining the exclusions, and that they were keeping so much money for something with so little value to us. We feel badly let down by* [C&G]*. PPI was just included as part of the package with our mortgage. We had no interest in PPI and would not have had it if* [C&G] *had not included it with the package.*

126. Mr and Mrs G are effectively saying that as a result of what their representative WFAC has told them, both about what it considers should have happened and what they should have decided at the time, they would not have taken out the policy.

127. In light of the findings I have already made, I do not think Mr and Mrs G's representations demonstrate what they claim because much of the information they say would have affected their decision would not have been known to them at the time of the sale if everything had happened as it should. And some of the things they have mentioned would not have been relevant to the decision they were making. For example:

- There was no legal, code, or good practice requirement on C&G to disclose the commission it received.

- I am satisfied the requirement on C&G in 2002 was to consider the features of the policy and weigh up the significance of the exclusions and limitations to ensure the policy it was recommending was suitable for Mr and Mrs G's needs and resources and it also had to explain the features of the cover as I have discussed.

- Mrs G's childhood illnesses – to the extent, if any, they might have been considered a pre-existing condition – were not relevant as the policy only covered Mr G. And Mr G's were unlikely to have been deemed to be pre-existing medical conditions.

- The policy did not – as I have already explained – restrict claims based on back or mental health conditions, unless they were pre-existing conditions.

128. I am also mindful that: Mr and Mrs G's recollections of the sale are, owing to the significant passage of time, likely to be limited; their representations about what they would have done are made in support of a claim for compensation; and the paragraphs I have quoted resemble quite closely the consumer representations made in other cases where WFAC represents the consumer.

129. In deciding with appropriate information whether to follow the recommendation to take out the policy, I consider it fair and reasonable to think Mr and Mrs G would have weighed up various other considerations, in particular their lack of savings and their financial circumstances and how they would be affected if Mr G was not working. It is likely they would also have thought about whether the cost to benefit proposition still worked for them.

130. Having considered all of the evidence and arguments in this case, I consider it more likely than not that Mr and Mrs G would still have taken out the policy. The policy was suitable for them, was sufficiently close to what it is likely they thought they were getting and provided benefits that would help them manage the consequences were Mr G made redundant, or unable to work through the accident or disability. In the circumstances I consider it more likely than not that Mr and Mrs G would have taken out the policy in any event notwithstanding the limitations on cover.

131. In reaching that conclusion, I have carefully considered Mr and Mrs G's representations about the approach they consider a court would take when considering an 'advised sale'. In particular, Mr and Mrs G have cited select paragraphs of the judgment in *Saville v Central Capital* [2014] EWCA Civ 337 (*Saville*). They say this shows C&G should have asked them 'open and fair' questions about their demands and needs at the time and if it had, they would not have taken out the policy because they would have wanted a policy which paid out immediately and would continue to pay out for the remaining term of the mortgage if they needed to claim, without an 'any similar gainful occupation' limitation.

132. I note that the *Saville* case involved very different circumstances to those in Mr and Mrs G's complaint. For instance, *Saville* involved a term mismatch between a 5-year single premium PPI policy and a 25-year loan and a consideration of the requirements of the Insurance Conduct of Business Rules that applied to sales between 2005 and 2008 – neither of which apply here. But in any event, even if C&G had asked the kinds of questions Mr and Mrs G say it should have done and pointed out the limitations on cover associated with the policy recommended, I think it is more likely than not that Mr and Mrs G would have taken out the policy in any event given the benefits it still provided and their overall circumstances.

133. I have considered Mr and Mrs G's representations about causation and DISP App 3, including the general opinion of Stephen Knafler QC provided by WFAC on behalf of Mr and Mrs G and the further representations it has made about this issue in response to the Provisional Decision. The DISP App 3 guidance is for firms, but it is a relevant consideration I take into account along with many other things when I decide what is in my opinion fair and reasonable.

134. I am mindful of the purpose of the guidance. I don't think it was ever intended to be at odds with the approach I have taken. The FSA explained its thinking in the policy statement at the time:[4]

> *…we have taken as a starting point the typical approach in law (which we understand also to be the FOS's general approach) that the customer should be put in the position they would have been in if there had been no failure to comply with its obligations on the part of the firm. Typically that involves considering what the customer would have done 'but for' the firm's breach or failing. Firms have also been making such 'but for' judgements for many years, it being the basic tenet of complaint handling. Complaints about PPI are not new or unusual in this respect. We are satisfied that the 'but for' test is a reasonable one in the circumstances.*
>
> *The presumptions represent a way of judging what a customer would generally have done, in our view. Having given due consideration to responses concerning presumptions we remain of the view that the presumptions we have set out are reasonable ones fully in the tradition of, and informed by, the kinds of judgements that courts and ombudsmen have long and often been making when assessing claims and complaints and the potential need to put the claimant, as far as practicable, back in the position 'they would have been in' had the breach not occurred.*
>
> *We also recognise that it would not be possible to establish in every case what a customer would have done in every individual circumstance and that there has to be scope for a firm to depart from the presumptions. So, the presumptions are rebuttable – that is, it is open to the firm to evidence that the customer would have bought the policy notwithstanding the breach or failing, in which case no redress will then be required.*

[4] Financial Services Authority Policy Statement 10/12 The assessment and redress of Payment Protection Insurance complaints – Feedback on the further consultation in CP 10/6 and final Handbook text – page 43 to 45

135. It also said:

> *A recording of the sale is not essential to rebut the presumptions. Where it is not available, firms must fairly assess the available evidence to make a decision about what they think would likely have happened, but for the failing, given the circumstances and the evidence from the sale. For example, if the firm failed to disclose the existence of an exclusion relating to pre-existing medical conditions, then it may be reasonable for the firm to rebut the presumption that the customer would not have bought the policy if it can be shown that the customer did not have a pre-existing medical condition. It is unlikely that a recording of the sale would elicit this information. The PPIQ, if properly completed, will however provide this information.*
>
> *We have carefully considered, in light of responses, the proposed list of 'substantial flaws' in the proposed Handbook text. We are satisfied that the rebuttable presumptions cover substantial flaws and that our proposals are appropriate because in each case the nature of the failing raises serious doubts over whether the customer would have proceeded with the purchase if there had not been such a failing.*
>
> *It is true that the presumptions do not make allowance for the materiality of the failings. We consider that the failings amount to substantial flaws irrespective of their materiality to particular consumers, and that it is reasonable and simpler for our guidance not to differentiate the failings in terms of materiality. In practice, firms are likely to be able to factor in considerations of materiality when potentially rebutting the presumptions in the case of a particular complaint. For example if a firm failed to disclose an exclusion, and if that exclusion did not apply to that customer at the time of the sale (something which can be evidenced relatively straightforwardly with reference to the policy), it may be reasonable for the firm to conclude (assuming there are no other failings) that the exclusion was not material to that customer and that he would have bought the policy anyway, notwithstanding the firm's failure to disclose the exclusion…*

136. I have thought about what outcome applying the FCA's guidance to this complaint might lead to. In the language of DISP App 3, I have found it would be reasonable to conclude there were substantial flaws in the sales process. In those circumstances, DISP App 3 says it should be presumed Mr and Mrs G would not have bought the payment protection insurance they bought unless, in the particular circumstances of the complaint, there is evidence to rebut the presumption.

137. I am satisfied, applying DISP App 3, it is reasonable to conclude the presumption is rebutted in the particular facts and circumstances of this complaint. Based on the evidence pertaining to Mr and Mrs G's circumstances I have considered above, I consider it reasonable to conclude the position Mr and Mrs G found themselves in as a result of the sale was the same position they would have been in had the 'breach' or 'significant failings' not occurred. In other words, I am satisfied that Mr and Mrs G would have bought the policy in the absence of the breach or failing.

138. I am mindful of Mr and Mrs G's representations that the presumption may only be rebutted when the flaws in the sale process were immaterial, that the flaws in this case were highly material and I have failed to give proper weight to the evidence –

including their own representations – that they would not have taken out the policy. However, I am not persuaded by those representations.

139. Even if I am ultimately departing from the guidance for firms set out at DISP App 3 (which I do not consider I am), I am doing so because I do not consider, in this case, that it would represent fair compensation to put Mr and Mrs G in the position they would have been in if they had not bought the policy.

140. That is because, whilst I accept it is possible that they would not have taken out the policy, I am satisfied that of the two possibilities, it is more likely than not that they would still have taken out the policy if their needs had been assessed correctly had they had been given clear, fair and not misleading information about the policy they were buying.

141. I am satisfied it would not be fair and reasonable in those circumstances to conclude C&G should pay Mr and Mrs G redress, as that would put them in a better position than they would have been in if everything had happened as it should have done.

142. It follows from my findings that on the balance of probabilities it is more likely than not that Mr and Mrs G would have taken out the policy if things had happened as they should. I am not persuaded they have suffered loss or damage as a consequence of the way this policy was sold.

143. I have also carefully considered Mr and Mrs G's representations about the approach a court might take if (which in my view is by no means certain in this complex area of law) it were to conclude C&G misrepresented the contract to Mr and Mrs G and about the remedy a court might award if it were to find that C&G had been in breach of its duty of utmost good faith. But they do not persuade me to alter my conclusions about what is fair and reasonable in all the circumstances of the complaint and what is fair compensation in the circumstances of this case. As I have explained above I do not consider it would be fair and reasonable to put Mr and Mrs G in a better position than if everything had happened as it should have done.

144. I have thought about whether it would be appropriate to make an award of some kind because of the flaws I have identified in the sale process even though I have found Mr and Mrs G would still have taken out the policy. I have not seen anything in the evidence relating to this case which leads me to conclude that Mr and Mrs G suffered material distress or inconvenience because of the way the policy was sold or any other form of non-pecuniary financial loss. In those circumstances, I do not consider it would be fair to make an award.

my final decision

145. Overall, having considered all the evidence and arguments to decide what is, in my opinion, fair and reasonable in all the circumstances of this complaint and for the reasons I have set out in detail above, my final decision is that I do not make an award or direction in favour of Mr and Mrs G.

146. **I now ask Mr and Mrs G to either accept or reject my decision by 27 December 2017.**

Nimish Patel
ombudsman